fic performance. There will be an order that the court below should proceed to fix the damages.

The deposit should be paid to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Skrine & Co.; H.Y. Lee & Hee.*

THE "MELANIE" UNITED ORIENTAL ASSURANCE SDN. BHD. KUANTAN v. W.M. MAZZAROL

[F.C. (Salleh Abas C.J. (Malaya), Seah & Syed Agil Barakbah F.JJ.) August 25, 1983 & January 20, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 296 of 1982]

Insurance – Insurance of vessel – Vessel grounded on sandbank at mouth of Kuantan river – Alleged failure to disclose earlier accident relating to vessel – Information given to agent of insurance company – Whether accident due to peril of the sea or due to lack of diligence – Whether there was total constructive loss of the vessel.

Shipping Law – Marine Insurance – Insurance of vessel – Total constructive loss – Applicability of English law – U.K. Marine Insurance Act, 1906 – Civil Law Act, 1956, s. 5(1).

This was an appeal from the decision of George J. reported in [1983] 1 M.L.J. 328. The respondent was the owner of a boat the "Melanie" which he had sailed from South Australia to Singapore and then to the east coast of Peninsular Malaysia. Upon arrival at Kuantan he did not enter the Pahang River but dropped anchor outside the river mouth at a point about 500 yards to the South. He left the boat and went ashore by getting a lift in a passing fishing boat. During the night the sea dragged the anchor and the boat closer to the shore and left it grounded in low waters. With the help of a fishing boat the "Melanie" was set free and finally towed into the river and safely anchored. Subsequently the respondent insured the boat with the appellant company through an agent of the defendant company. He had told the agent of the earlier grounding but this was not stated in the application. The vessel was taken out to sea by the respondent and when returning into the river the boat came into contact with the sand-bar at the mouth of the river. The boat was grounded and could not be salvaged. The respondent claimed the insured sum of $40,000.00 from the appellant company and judgment was given for him in the High Court. The appellant company appealed.

Held: (1) the omission by the respondent to state the earlier mishap in the proposal form was not his fault but that of the appellant company themselves for framing ambiguous questions. Such ambiguity must be resolved in favour of the respondent;

(2) it is settled law that where an agent is authorised to negotiate and settle terms of a proposal or delegated with a duty to investigate certain matters, the agent's knowledge is also the knowledge of the insurance company. In this case the learned judge was right in holding that the agent was acting as agent for the appellant company when he received the information about the earlier mishap from the respondent;

(3) on the facts of this case the learned judge was correct in holding that there was no way in which the respondent could have adopted to avoid hitting the sandbar, short of not venturing out to sea at all and that having regard to the position of the sandbar, even the most experienced navigator of the area, like the port pilot, could not have avoided the accident. The appellant's submission on the issue of negligence must fail;

(4) in view of the finding by the learned judge that the accident was caused by the boat striking a submerged sandbank which was marked in the charts to be a sea-lane, this could not be otherwise than a fortuitous danger, a danger which no human skill could possibly avoid and guard against. The danger having been created by the sea, the accident to the boat must be due to peril of the sea;

(5) the boat would be a constructive loss if the respondent could prove (a) that her abandonment was reasonable and (b) that on the date of the commencement of the action it was unlikely on the basis of the facts that existed that the boat could be recovered. In this case both questions must be answered in favour of the respondent.

Cases referred to:

(1) *Schoolman* v. *Hall* [1951] 1 Lloyd's Rep. 139, 142.
(2) *Newsholme Brothers* v. *Road Transport and General Insurance Co. Ltd.* [1929] 2 K.B. 356.
(3) *Bawden* v. *The London, Edinburgh and Glasgow Assurance Co.* [1892] 2 Q.B. 534.
(4) *Ayrey* v. *British Legal and United Provident Assurance Co. Ltd.* [1918] 1 K.B. 136.
(5) *Evans* v. *Employers Mutual Insurance Association Ltd.* [1936] 1 K.B. 505.
(6) *Marstrand Fishing Co. Ltd.* v. *Beer* [1937] 1 All E.R. 158, 164.
(7) *Petros M. Nomikos Ltd.* v. *Robertson* [1939] 64 Ll. L.R. 45.
(8) *Rickards* v. *Forestal Land, Timber and Railways Co. Ltd.* [1941] 3 All E.R. 62.

FEDERAL COURT.

Cecil Abraham (*Wilfred S.J. Abraham* with him) for the appellant.

Shah Balendran for the respondent.

Cur. Adv. Vult.

Salleh Abas C.J. (Malaya) (delivering the Judgment of the court): On November 20, 1977 the respondent, an Australian, who is a sailing enthusiast arrived in Kuantan waters in his boat called "Melanie", which he personally built and navigated single-handed from his hometown Purnside, South

Australia. Upon arrival at Kuantan, he did not enter the Pahang river but dropped anchor outside the river mouth at a point about 500 yards to the south. He left the boat and went ashore by getting a lift in a passing fishing boat. During the night the sea dragged the anchor and the boat closer to the shore and left it grounded in low waters. With the help of a fishing boat the "Melanie" was set free and finally towed into the river and safely anchored in deep waters at the fishermen's jetty.

At the suggestion of his friend named Cassidy, a fellow Australian who had a similar boat and had earlier insured his boat with the appellant company, the respondent insured the "Melanie" with the appellant company through the latter's sales representative named Thandayuthapany (referred to as Pany), (PW2), who came to see him with a proposal form on December 8, 1977. With Pany's help the respondent filled up the form, signed it and returned it to Pany, who in turn handed it to the branch office of the appellant company at Kuantan. Having received the completed proposal form, Peter D'Cruz (DW2), who is the local senior branch manager of the appellant company, issued a Cover Note on December 10, 1977 insuring the hull and the machinery on board for M$50,000.00 for a year with effect from December 13, 1977 i.e. three days after the issue of the Cover Note and the balance of M$1,000.00 was to be payable on or after the issue of the Policy.

On December 30, 1977 at about 1.00 p.m. the respondent took out the "Melanie" from her mooring place at the jetty to sea with two other persons on board. On her return journey at about 3.30 p.m. on the same afternoon as she was approaching the river mouth the "Melanie" had an accident. She struck a portion of a submerged sandbar which, according to the charts, was marked as a sea-lane, whose depth ought to be about 9½ feet. She got stuck fast on it and the waves kept on pushing her to shallow waters. When the tide ebbed the "Melanie" was left securely grounded and forlornly listing on one side. Attempts to release her were unsuccessful because the sea was too rough.

The respondent could find no one to pull out the boat and by January 3, 1978, i.e. 4 days later he came to the conclusion that the boat was beyond salvage. He therefore made out a statement of facts and submitted it together with a sketch location plan to the appellant company and to the Kuantan Marine Department for the purpose of claiming the benefit under the insurance. The appellant company refused to entertain the claim and so the respondent started a civil suit, which is the subject matter of the present appeal, on February 22, 1978.

The trial was held before George J. who gave judgement in favour of the respondent and hence this appeal.

In the appeal before us, counsel for the appellant company raised the same issues as he did in the court below and we will deal with these issues one by one.

Non-disclosure:

It is the submission of counsel for the appellant company that a contract of insurance being an *uberrimae fidei* contract, they are entitled to repudiate their obligations because the respondent had been guilty of a non-disclosure for failing to disclose to them that the "Melanie" had an accident on November 20, 1977 (referred to in the judgement as "the earlier mishap"). Counsel for the respondent on the other hand submitted that the respondent was not guilty of any such non-disclosure because in the first place none of the questions in the proposal form which the respondent completed and signed require him to disclose such accident and in the second place the appellant company's agent, Pany, with whom the respondent dealt in effecting the insurance had knowledge of the earlier mishap, because not only was he told by Cassidy but also by the respondent himself.

The proposal form has a number of questions. But only three of them are relevant for the purpose of this case. These are:

"(a) Do you own any other vessels? Answer: No.

(b) Give details of accidents that occurred in the last four years to these vessels? Answer: No.

(c) Any of these accidents relate to the vessel proposed for insurance? Answer: Not applicable."

A careful study of these questions clearly shows that the questioner only wanted to know whether such accidents as had occurred to a proposer's other vessels had any connection with or relation to his vessel which he proposed to insure. The questions are not directed to know whether the vessel he proposed to insure had any accident at all. As the respondent had no other vessels, we cannot see how the negative answers given thereto could be regarded as wrong and amounted to a

non-disclosure. The negative answer to question (a) is certainly correct, because the respondent had no other vessels. Similarly, for the same reason the negative answer to question (b) is also correct, although it is more accurate for the respondent to state "not applicable" or "does not arise". The "non-applicable" answer to question (c) is also correct because how could accidents occur to the respondent's other vessels when he did not own any such vessels and if there were no such accidents how could they be related to the "Melanie"? We certainly agree with the view expressed by the learned trial judge when he observed in his judgement:

"If in fact the plaintiff" (i.e. the respondent) "did not own any other vessels, then accidents could not have happened to them and accidents that could not have happened could not relate to the vessel proposed for insurance."

The questions, odd though they may sound to be, clearly exclude accident to the vessel proposed for insurance, unless the respondent had other vessels and these vessels had accidents and the accidents related to the vessel to be insured.

In our judgement the omission by the respondent to state the earlier mishap in the proposal form was therefore not his fault but that of the appellant company themselves for framing ambiguous questions. Such ambiguity must be resolved, according to the *contra proferentum* rule in favour of the respondent. (*Ivamy* Marine Insurance, 3rd. Ed. p. 358).

At the bottom of the proposal form is a statement requiring the respondent to disclose fully and faithfully all the facts which he knew or ought to know, otherwise the policy issued thereunder could be void. Of course, there is no presumption in insurance law that matters not dealt with in a proposal form are not material, *Schoolman* v. *Hall*[1]. Thus it would appear that despite the fact that the respondent had correctly answered the questions in the proposal form he still had to disclose the earlier mishap to the appellant company. The next question is therefore whether communication of the earlier mishap to the appellant company's agent, Pany, is a sufficient communication.

There is a very clear evidence on this in that Pany knew of the earlier mishap because he was told by Cassidy who had informed him that the respondent wanted to insure his boat and that the respondent personally told him again on December 8, 1977 whilst he was completing the proposal form. But Pany, thinking that the information was not important, kept the information to himself and did not pass it on to his superior officers. He did, however, go to see the "Melanie" anchored at the fishermen's jetty and inspected her in order to satisfy himself as to her value. This was done before he had handed in the completed proposal form to the appellant company's branch office for further action. There is also a clear evidence that Pany had assisted the respondent in completing the proposal form.

Whilst we agree that Pany must be regarded as acting as an agent for the respondent in so far as he assisted the former in completing the proposal form – see *Newsholme Brothers* v. *Road Transport and General Insurance Co. Ltd.*[2] – we think that the learned trial judge was correct in holding that Pany was not acting as an agent for the respondent, but acting on behalf of the appellant company when he received the information about the earlier mishap from Cassidy and the respondent. The capacity in which he received the verbal information must be the same as the capacity in which he went to see the respondent with the proposal form, gave it to him, received it back from him, inspected the "Melanie" and handed the form to his branch office. All these acts, except the tendering of advice as to how to fill the proposal form, were done in his capacity as an agent of the appellant company. Pany was a paid employee of the appellant company. He was paid a salary and also a commission based on the volume of business he brought in. Before he was sent to see the respondent with the proposal form on December 8, 1977 he had spoken to his branch manager, DW2, about the respondent's intention to insure the "Melanie", and in reply the branch manager told him that the appellant company would be interested in the cover. This evidence was confirmed by DW2 himself. This means that Pany was authorized to negotiate and settle the terms of the business on behalf of the appellant company. Consistent with this authority is his visit to the "Melanie" in order to see her for himself and be satisfied as to her insured value of M$50,000.00.

It is settled law that where an agent is authorized to negotiate and settle terms of a proposal or delegated with a duty to investigate certain matters, the agent's knowledge is also the knowledge of the insurance company. *Bawden* v. *The London, Edinburgh and Glasgow Assurance Co.*[3]; *Ayrey* v. *British Legal and United Provident Assurance Co. Ltd.*[4] and *Evans* v. *Employers Mutual Insurance Association Ltd.*[5]

Unlike the practice of marine insurance in the United Kingdom, where insurers sit tight in their offices and only deal with brokers who arrange insurance for their clients, the appellant company had chosen to conduct their business by employing their own sales representatives or agents and it is with them that their customers have to deal. Their customers do not go and see the managers or directors who sit in the office in order to buy insurance, but deal with the agents who go out to seek business for the appellant company. If a certain vital information necessary for the business is given to the agent by the customers, we cannot see how in law and on the basis of commercial expediency the appellant company could be allowed to take advantage of the fault of their own agent for failing to communicate the information to them. If they have chosen to adopt that system of employing agents and have authorized them to negotiate and settle business, they must accept the fault in the system as well. No blame could be held against their customers, because they have done everything that is required of them to do and also because it is reasonable for them to assume that the communication to the agent is equivalent to a communication to the insurance company's office.

We therefore hold that the appellant's submission on non-disclosure fails.

Peril of the sea or want of due diligence:

The next contention of the appellant company is this: Even if the insurance is valid because the respondent had not been guilty of non-disclosure, the appellant company are still not liable under the insurance because the accident resulting in the loss of the "Melanie" was not due to peril of the sea but due to the lack of due diligence on the part of the respondent.

As to these questions the matter is clearly a finding of facts. The learned judge who heard the evidence made a finding that the respondent was not guilty of lack of skill or due diligence. The respondent had been a sailing enthusiast for the last 10 years before the accident at Kuantan. He had taken a six months' correspondence course in celestial navigation and chart reading and had even built the "Melanie" himself and navigated her single-handed from his home town in Australia to Singapore, and from there up to Kuantan without any mishap; his final destination being Pattaya in Thailand. On his arrival at Kuantan waters, like any other good sailor he did not choose to navigate his boat into Pahang river but cast anchor outside the river mouth. On this evidence the learned judge is amply justified in finding that there was no lack of skill or competence on the part of the respondent.

As to the accident, the learned trial judge found that the portion of the sand bar which the "Melanie" had struck was a submerged one and marked in the charts as the lane for the passage of vessels whose depth according to the charts should have been 9½ feet without taking into account the increase in the depth as a result of rise in river water. Thus, the charts are at variance with the physical conditions of the area which the charts are supposed to reflect. The physical changes occur much faster than the charts could be revised and must have occurred because of the constant work of the sea and the wind frequently changing the contours of the sea-bed. We agree with the observations of the learned judge that there was no way in which the respondent could have done to avoid hitting the sand-bar, short of not venturing out to sea at all and that having regard to the position of the sand-bar, even the most experienced navigator of the area, like the port pilot, could not have avoided the accident. In our judgement the appellant's submission on the issue of negligence also fails.

The next question is whether hitting a submerged sand-bank, which is shown by the charts not to be there, is a peril of the sea. There are many decided cases on the meaning and concept of perils of the sea. It is not necessary for us to go into the details of these cases as it is sufficient for our purpose to state here that peril of the sea is peril due to the sea and that it refers only to fortuitous accidents or casualties of the sea so that the damage could not be expressly guarded against. It is not a peril of the sea if the accident is caused by ordinary action of the winds and waves. Thus the unexpectedness of the peril due to the action of the sea is the main element of the concept. (25 *Halsbury's* Laws of England, 4th Ed., para 153 at page 93).

Reverting to the facts of the present case, we are of the opinion that in view of the finding by the learned judge that the accident was caused by the "Melanie" striking a submerged sand-bank which was marked in the charts to be a sea-lane it cannot be otherwise than a fortuitous danger, a danger which no human skill can possibly avoid and guard against. The danger having been created by the sea, the accident to the "Melanie" must be

due to peril of the sea. The appellant's submission on this issue thus fails.

Total loss, actual or constructive:

The Cover Note issued is for the marine hull insurance and states that it is subject "to all terms, conditions and clauses of the appellant company's Policy Form used for this class of business". The Policy covered total loss, actual or constructive. Obviously the learned trial judge did not consider the case to be an actual total loss at all, because he made no finding to that effect. In his judgement the "Melanie" was a constructive total loss, when the respondent abandoned her on January 3, 1978.

Counsel for the appellant company submitted to us that this finding was wrong. He contended that before a finding of a constructive total loss could be made there must be a proof that the cost of recovering the "Melanie" would exceed her value when recovered.

To deal with this submission we must refer to section 60 of the Marine Insurance Act 1906 of the United Kingdom. This Act is made applicable to Malaysia as part of our law by virtue of section 5(1) of our Civil Law Act 1956. Section 60 of the UK Act defines a constructive total loss as follows:

"60. Constructive total loss defined.
(1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured is reasonably abandoned on account of its actual total loss appearing to be unavoidable, or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

"(2) In particular, there is a constructive total loss –

(i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) it is unlikely that he can recover the ship or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or

(ii) x x x

(iii) x x x

At a glance we will observe that there are two definitions of a constructive total loss. One definition is given by subsection (1), being a general one and the other by subsection (2), being a more specific and precise one. Each definition contemplates two situations. Under subsection (1), a constructive total loss occurs where –

(a) the insured ship is reasonably abandoned on account of its total loss appearing to be unavoidable; and

(b) the insured ship is reasonably abandoned because she could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure had been incurred.

The two situations which come within the more specific and precise definition under subsection (2) are as follows:

(a) where the assured is deprived of the possession of his ship by a peril insured against, and it is unlikely that he can recover her;

(b) where the assured is deprived of the possession of his ship by a peril insured against, and the cost of recovering her would exceed their value when recovered.

A comparison of the two situations in subsection (1) with those in subsection (2) clearly shows that the definition given in subsection (1) is a general definition whilst the situation in subsection (2) is a particular one. (See *Marstrand Fishing Co. Ltd.* v. *Beer*[6]).

The two definitions have been the subject of many decisions in England, reaching as far as the House of Lords. Lord Wright in *Petros M Nomikos Ltd.* v. *Robertson*[7] said that subsection (2) is purely an objective definition, whilst subsection (1) deals with actual abandonment which is also an objective fact. His Lordship repeated this view in *Richards* v. *Forestal Land, Timber and Railways Co. Ltd.*[8] in that whilst the two subsections contain two separate definitions and could be applied to different situations, the definition in subsection (2) is additional to that in subsection (1), and not merely illustrative of it.

Whatever may be the position with regard to these two separate definitions of a constructive total loss, accepting the views of Lord Wright in the two cases quoted above we are of the opinion that it is not necessary that in every case wherein a constructive total loss is claimed there must be proof of the cost of recovering the ship. This proof is required only when the assured relies upon the second situation in both definitions. If the two definitions are combined into one, a constructive total loss occurs in either of the following two situations, namely –

1st situation – When the insured ship is reasonably abandoned on account of her actual total loss appearing to be unavoidable, and this may occur where the assured is deprived of her possession and it is unlikely that he could recover her.

2nd situation – when the ship is reasonably abandoned because it could not be preserved from actual total loss without incurring uneconomical expenditure and this may happen when the cost of recovery would exceed her value when recovered.

Thus, it could be seen that the evidence on costing and expenditure are really necessary only if the second situation is relied upon, although it may also be relevant for determining the reasonableness of the abandonment.

In our judgement the "Melanie" would be a constructive total loss if the respondent could prove (1) that her abandonment was reasonable, and (2) that on the date of the commencement of the present action, which is on February 22, 1978, it was unlikely on the basis of the true facts as they then existed that the "Melanie" could be recovered. Both these questions are questions of facts.

The position of the "Melanie" is best described by Mr. Chang Peng Sum (DW1), a Marine Surveyor, who was commissioned by the appellant company to inspect her. This witness said:

"I inspected the Melanie on 15.2.78. She was lying close to the channel about 100 yards south of the inner buoy. I see page 2 of ABI. What is shown there is about right.

I was on board a fishing boat with the Plaintiff and D'Cruz and we got to within about 200 feet of the Melanie.

I swam to the Melanie. Part of the stern (back portion) was visible, the rest of the boat was under water.

I found the following:

1. The hull was covered with moderate marine growths and was deeply seated within the sand bar.
2. The mizzen mast was broken and dislocated from its base and lying on the port (left) side.
3. The after guard rails deformed and twisted.
4. The starboard guard rails missing.
5. A hole about 3 inches by 4 inches on deck starboard side of after guy securing bolt.
6. Detachable equipment missing.
7. Glass windows and aluminium frames along cabin missing.

I did not examine the hull. I am not in a position to say whether the vessel was broken-up. I could not dive to inspect – it was muddy and waves were high.

I made enquiries as to what it would cost to list up the vessel and put it upright again. It would have cost between M$30,000.00 and M$35,000.00. This does not include repairs and replacements."

x x x x x x

(pp. 48 – 49 of Record)

"If the Melanie had got aground at the channel and had shipped water and was left there for a week or so, the equipment inside e.g. radio, furnishings and fittings would be a total loss. The engine could possibly be salvaged. As far as the hull is concerned it depends on whether keel plate had been broken at time of accident. If left for a long enough period the hull would weaken. The structure of the yacht ferro-concrete and not as resistant to waves as steel.

In February, 1977 I would say it was not economical to salvage the Melanie."

(p. 50 of Record)

The respondent in his evidence said:

"The opinion that she was beyond salvage was formed when I made out the report on 3.1.78.

On 31.12.77 in the afternoon when I got into the boat from the dinghy I got the impression that the hull was broken by being bounced by the waves. The mast was broken off lying beside the hull. There was sand in the hull. There was so much sand that I thought it must have come in from the bottom which means a broken hull.

I looked around at Kuantan for facilities to lift the boat and could not find any.

On the basis of all this I put in the report and wanted to see what the insurance could do."

(pp. 30 – 31 of Record)

Based on the above evidence the learned judge has this to say when he discussed the situation at Kuantan at the time:

"It was the height of the monsoon and there is evidence that the only way in which the "Melanie" could have been lifted was by means of a salvage barge from Singapore which according to PW3 would have cost during the off-monsoon period from M$20,000 to M$30,000 and during the monsoon period somewhat more. DW1 had made enquiries and testified that it would have cost between M$30,000 and M$35,000. This did not include the cost of repairs and replacement. In his report (AB page 1) the Plaintiff had stated that the fittings were completely destroyed or washed out. DW1 also testified that if the vessel had shipped water, in a week or so the equipment inside e.g. the radio and the furnishings and fittings would be a total loss. At that stage he thought that the

engine could possibly have been salvaged. In his view by February the vessel was beyond salvage."

(pp. 129 – 130 of Record)

and

"For all intents and purposes the vessel was lying at the bottom of the sea fully submerged at high tide and substantially submerged at low water. It had been buffetted by waves and forceably pushed further up the sand bar. Its hull may or may not have been holed and being made of ferro-concrete would not take the sort of buffetting that a steel hull would have taken. There was no local facilities for salvaging the vessel and to get a salvage barge out from Singapore would have cost M$30,000 to M$35,000 and the probabilities were that it might have been an action in futility."

(pp. 133 – 134 of Record)

We cannot find any fault with the above findings. In our view the "Melanie" was more likely to be lost than recovered and the respondent was therefore fully justified in abandoning his beloved ship. Thus the two questions, i.e. the reasonableness of abandonment and the unlikelihood of recovery are both answered in favour of the respondent.

The appeal is therefore dismissed with costs; the deposit shall be paid to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Shearn, Delamore & Co.; Balendran, Chong & Bodi.*

MAHADEVAN & ANOR. v. MANILAL & SONS (M) SDN. BHD.

[F.C. (Salleh Abas C.J. (Malaya) Abdul Hamid & Syed Agil Barakbah F.JJ.) November 12, 1983 & January 20, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 199 of 1983]

Practice & Procedure – Limitation – Advance of money – Claim for repayment – Whether based on contract or on equitable charge – Limitation Act, 1953, ss. 6 & 21(1).

Contract – Advance of money – Whether money received – Payment of cheques – Payment into banking account.

Banking – Account payee cheque – Effect of indorsement A/C Payee only.

In this case the respondents alleged that they had advanced to one Ratnavale (since deceased) the sums of (a) $29,500.00 paid on December 20, 1966 by a United Commercial Bank Cheque and (b) $250,000.00 paid on March 21, 1967 by Algemene Bank Nederland Cheque. The deceased repaid the sum of $50,000.00 leaving a balance of $229,500.00. The deceased died on April 19, 1973 and the appellants were the administrators of his estate. The respondents brought an action to recover the sum owing and the learned Judicial Commissioner who tried the case found in favour of the respondents. The appellant appealed and two issues were raised on the appeal –

(i) whether the deceased received the sums;

(ii) even if he did, whether the respondents' suit was not statute-barred, as the suit was commenced on July 30, 1974 that is, more than seven years after the money was received.

Held: (1) as regards the first payment of $29,500.00 it had been proved beyond doubt that this sum was received by the deceased. The cheque was paid into the bank account of the deceased;

(2) as regards the second payment of $250,000.00 although this was made by cheque in favour of M/s Ong Huck Lim & Co. with a crossing "A/C Payee only" the evidence showed that it was endorsed by Mr. Ong Huck Lim in favour of the deceased and paid into the bank account of the deceased;

(3) the irresistible inference in this case is that the bank into which the cheques were paid must have collected the proceeds for the deceased's account. If the appellants denied the receipt of the sums and wished the court to believe that the deceased did not receive them it is they who should disprove the receipt. This they had failed to do;

(4) the question whether the suit was statute-barred depends upon the purpose for which the sums were paid and the nature of the rights acquired by the respondents regarding the payments;

(5) there is no provision in the National Land Code prohibiting the creation of equitable charges or liens. Therefore equitable charges and liens are permissible under our land law. The words "other charge on land" in section 21(1) of the Limitation Act must be construed to include equitable charges and liens as well.

(6) in this case the evidence showed that the first sum of $29,500.00 was meant to be a ten per cent deposit towards the purchase of land in which the respondents and the deceased were engaged in a joint venture. The transaction therefore resulted in an equitable charge in favour of the respondents. Section 21(1) of the Limitation Act, therefore applied and the suit was not statute-barred;

(7) as regards the second sum of $250,000.00 the evidence was not as clear-cut. On the evidence there was no sufficient proof on the balance of probability that this sum was given to the deceased as the respondents' share of the capital of a joint venture between them and the deceased to purchase the Meera Estate Land. It would appear that the money was a personal loan